PEMUNGUT HASIL TANAH, SEBERANG PERAI UTARA, BUTTERWORTH *a*

v.

BERTAM CONSOLIDATED RUBBER CO. LTD.

SUPREME COURT, KUALA LUMPUR
HASHIM YEOP SANI CJ (MALAYA)
HARUN HASHIM SCJ
GUNN CHIT TUAN SCJ
[SUPREME COURT CIVIL APPEAL NO. 427 OF 1988]
30 DECEMBER 1989 *b*

LAND LAW: *Land Acquisition - Assessment of compensation payable - Comparable sales - Comparable compensation paid in similar cases - Whether can be used as a guide to assessment of damages - Method of valuation of market value of land - Average value as base figure - Adding of increases for development potential - Interest rate applicable - Section 48 of Land Acquisition Act - Whether rate of interest applicable is post or pre Land Acquisition (Amendment) Act 1984 - Whether surveyor's and engineer's fees incurred by landowner reimburseable - Whether landowner entitled to costs of appeal - Section 52(1)(b) of the Land Acquisition Act allows costs - Whether undertaking by Government Department to maintain drains can be issued under para. 2 of First Schedule to Land Acquisition Act - Whether request for such undertaking is superfluous - Whether unquantified potential damages are recoverable by undertaking.* *c* *d*

The appellant had acquired 32 acres out of some 5,000 acres of rubber land owned by the respondent under the provisions of the Land Acquisition Act 1960 ("the Act"). *e*

The Collector awarded a sum of RM322,272 for the land and interest at 6% per annum as well as a sum of RM673,832.61 (part of which is interest calculated at the rate of 6% per annum) as compensation for other items.

The respondent referred the award to the High Court, requesting an increase of the sums ordered to be paid. The High Court, *inter alia*: *f*

(a) increased the sum of RM322,272 to RM383,503.96 (i.e., 20%);

(b) increased the interest to 8% (on the increase of the principal sum) from the date of possession of the land by the appellant to the date of payment:

(c) awarded an additional sum of RM27,200 as compensation for cost of new drains;

(d) ordered that the fees paid by the respondent to its valuers and engineers be paid by the appellant subject to verification; *g*

(e) awarded to the respondent costs of the proceedings; and

(f) ordered that the State Government of Penang provide an undertaking to the respondent in terms approved by this Court that it will be responsible for the maintenance of the branch drains ("the undertaking") and that in the event the undertaking was given during the currency of the appeal then order (d) above shall be rescinded; and *h*

(g) declared that upon default of (f), the respondent shall be entitled to reimbursement of all expenses reasonably incurred and properly substantiated for the maintenance (including dredging) of the branch drains concerned so as to ensure a smooth flow of *i*

water and waste in the main drains and thus prevent and flooding and damage to crops on the remaining unacquired land of the respondent's, such expenses to be recoverable as a debt due and payable (order (f) and (g) shall be referred to as "the declaration").

The appellant appealed to the Supreme Court against parts (b), (c), (d), (e), (f) and (g) of the above High Court Order and the respondent cross-appealed for:

(a) increased compensation for the land (part (a) of the High Court Order) on the ground that the sum paid was lower than the market value;

(b) the refusal of the High Court to award compensation for loss of crops in order to make way for new drains under the head of severance and injurious affection.

The land acquired followed the alignment of an existing estate's laterite road, about 15 feet wide, which was widened by the acquisition, to 30 feet. It was agreed between the valuers representing the parties, that the stretch of land acquired should be zoned into belts, each belt to reflect its distance from the Kepala Batas Town and the degree of potentiality. The valuers however disagreed on the value of each of the 3 agreed belts (called Zones A, B, and C) where Zone A was within the first 80 chains, Zone B the next 80 Chains and Zone C the remaining 164 chains. The Government valued the same at RM15,000 (80% increase), RM9,000 (10% increase) and RM8,000 per acre respectively whereas the respondent's valuer valued the same at RM30,000, RM15,000 and RM7,500 respectively.

The respondent in asking the Court to increase the compensation for the land produced to the Court evidence of 2 land sale transactions, one involving a sale of a lot adjacent to a commercial lot by the respondent to a subsidiary of the respondent company and another involving a purchase by the respondent of a small piece of land in Kepala Batas Town.

On the question of interest, arguments centred on s. 48 of the Act as amended by the Land Acquisition (Amendment) Act 1984 which came into force on 20 January 1984. The amendment increased the interest payable by the appellant from 6% to 8% from the date the appellant took possession of the land to the date of payments. The appellant took possession of the land on 21 February 1980 and the question was which was the rate that was applicable.

On the question of the declaration, the respondent argued that prior to the acquisition, they had constructed certain drains on both sides of the laterite road which branch roads flowed into the main drains maintained by the Drainage and Irrigation Department. This was to prevent flooding in the estate. The dispute before the Court turned on whether the drains constructed by the Government on both sides of the road (after acquisition) are deep enough for flood control. The respondent argued that as damage was likely, which damage is not possible to quantify, the Judge had to make the order for the declaration.

Held:

[1] The 1st land sale transaction was not an arms length transaction and the 2nd land sale transaction was not comparable to the land acquired.

[2] The Government valuer relied on evidence of awards made and accepted sufficiently proximate in point of time to the relevant date for the purposes of valuation - this method of valuation is acceptable although not necessarily conclusive evidence of market value. They however act as acceptable comparables in the absence of comparable sales.

[3] The method of assessment of fair market value (i.e., the average value as the base figure and then increasing it for development potential) as computed by the Government valuer is the correct and equitable method of valuation.

[4] Applying *Municipal Council of Sydney v. Troy*, the respondent has title to the higher rate of interest as from the date of the coming into force of the new rate even though the land was acquired before the said date. The new rate is not applicable to the period before the new rate came into force.

[5] On the question of the surveyor and engineers fees, and on the authority of *Harrison's & Crossfields (M) Sdn. Bhd. v. Pemungut Hasil Tanah, Wilayah Persekutuan,* there is no provisions in the Act and the Schedule to justify the making of an award of this nature.

[6] On the question of costs, a true reading of s. 51(1)(c) of the Act provides that if the claim by the respondent exceeds the amount of the Court Award by 20% or more then the respondent shall not be entitled to costs - there the difference between the respondent's claim and the Court award was 56.3% thus exceeding the said 20%. The respondent is therefore not entitled to costs.

[7] On the question of the declaration - para. 2(f) of the First Schedule to the Act provides that the Government may be requested to give an undertaking to construct (and not to maintain) drains - the order for the undertaking must then fail. Paragraph 2(d) of the same schedule provides that the respondent is entitled to damages caused by the flooding which damages must be assessed and quantified at this stage. There cannot be an undertaking from the Government in substitution for compensation.

[8] As the Drainage and Irrigation Department is responsible for the maintenance of the drains, there is sufficient infra-structure and co-ordination to meet the objects of the declaration and as such the declaration is superfluous.

[Appellant's appeal allowed by the setting aside of paras. (c), (d), (e) and (f) of the High Court Award. (As stated above); interest on the excess compensation varied to 6% p.a. from 21 February 1990 to 19 January 1984 and 8% thereafter to date of payment. Respondent's cross appeal dismissed. Costs of appeal to be borne by respondent. Deposit refunded to appellant.]

Cases referred to:
Ng Tiou Hong v. CLR Gombak [1984] 1 CLJ (Rep) 289
Bertam Consolidated Rubber Co. Ltd. v. CLR Butterworth [1984] 1 CLJ (Rep) 78
Municipal Council of Sydney v. Troy [1928] AIR PC 128
Consolidated Plantation Bhd. v. Pemungut Hasil Tanah Klang [1984] 1 CLJ (Rep) 93
Harrison's & Crossfields (M) Sdn. Bhd. v. Pemungut Hasil Tanah, Wilayah Persekutuan [1988] 2 MLJ 299

Legislation referred to:
National Land Code 1965, s. 214A

For the appellant - Mohd. Sa'ari bin Yussof, SFC (Hashim bin Dato Hj. Yusoff, LA with him) of Attorney-General's Chambers
For the respondents - N.G. Sivanandan; M/s. Presgrave & Matthews

JUDGMENT

Harun Hashim SCJ:

Bertam Estate is a rubber and oil palm estate of more than 5,000 acres in area. On 3 September the State Government of Pulau Pinang issued a declaration of intended acquisition of about 32 acres of the estate for the purpose of constructing a public road through the estate. The effect of the intended acquisition was in fact to convert an existing private laterite road in the estate to a public metalled road.

An enquiry was held on 22 October 1980 under the Land Acquisition Act 1960 and the Collector made an award on 17 December 1981 as follows:

(a) For the Land:

(i) at RM15,000 per acre amounting to	RM120,000.00
(ii) at RM9,000 per acre amounting to	72,000.00
(iii) at RM8,000 per acre amounting to	130,272.00
(b) Interest at 6% from 21 February 1980 to 17 December 1981	33,838.56
(c) Compensation for loss of:	
(i) Trees affected by pond	810.00
(ii) New fence	13,728.00
(iii) Cost for Annual Sums	240,345.49
(iv) Replacement of well	15,000.00
(v) Resiting of pump-house	2,000.00
(vi) Construction of new tank	12,000.00
	639,994.05

On 25 February 1982 the respondents applied to the Collector to refer the award to the High Court on the ground that the compensation awarded was "manifestly lower than market value" at the relevant date of acquisition. In the event, the learned Judge:

(a) Increased the award of compensation for the land by 20% from RM322,272 to RM383,503.96;

(b) The rate of interest was increased to 8% per annum on the sum of RM61,231.96 (being the difference of the Collector's award and the Court award) from 21 February 1980 (date of possession) to date of payment; and

(c) Compensation for:

(i) Loss of crops for new drains, pond and alternative road	-	Nil
(ii) Cost of new drains	-	RM27,200
(iii) Fencing of manager's bungalow	-	4,700
(iv) Cost of fencing for rest of estate	-	13,728
(v) Cost of alternative road	-	Nil
(vi) Claim for reimbursement of insurance premia	-	Nil

(vii) Reimbursement of all fees paid by the respondents to its valuers and engineer subject to verification.

(viii) Costs of the proceedings to be paid by the appellant.

On a further hearing on 22 and 25 August 1988 and 9 December 1988, the Court ordered:

> that in default of a legally enforceable undertaking in writing by the State Government of Penang in terms to be approved by this Court that it will be responsible for the maintenance of the branch drains concerned, there shall be in favour of the objectors and their successors in title a declaration that they be entitled to reimbursement of all expenses reasonably incurred and properly substantiated for the maintenance (including dredging) of the branch drains concerned so as to ensure a smooth flow of water and waste in the main drains and thus preventing any flooding and damage to crops on the remaining unacquired lands of Bertam Estate, such expenses to be recoverable as a debt due and payable, with liberty to the parties and the successors in title of the objectors to apply to Court in the event of any dispute in regard to claims for such expenses **and this Court doth lastly order** that in the event of the said undertaking being given during the pendency of the appeal from this judgment then the award of RM27,200 for the cost of new drains shall be rescinded.

The Collector now appeals against the award of:

(a) RM27,200 for drains;

(b) Interest at 8%;

(c) Reimbursement of fees for Surveyors & Engineer;

(d) Costs;

(e) The declaration for reimbursement in the event of flooding.

And the respondents cross-appeal against:

(a) Compensation for land on the ground that it is lower than the fair market value; and

(b) In not awarding compensation for loss of crops to make way for new drains under head of severance and injurious affection.

Compensation for Land

The land acquired follows the alignment of an existing estate laterite road about 15 feet wide which is widened by the acquisition to 30 feet. Both the Government valuer and the respondents' valuer have agreed that for purposes of valuation the stretch acquired be zoned into belts and apportion values to each belt to reflect its distance from Kepala Batas Town and degree of potentiality but the valuers have disagreed as to the valuation of each belt as follows:

	Govt. Valuer	**Respondents' Valuer**
Zone A - First 80 chains	- RM15,000 p.a.	RM30,000 p.a.
Zone B - Next 80 chains	- RM 9,000 p.a.	RM15,000 p.a.
Zone C - Remaining 164 chains	- RM 8,000 p.a.	RM7,500 p.a.

The Collector accepted the valuation of the Government Valuer and made his award accordingly. The learned Judge increased this item of the award by 20%. The Government is not appealing against this increase but the respondents say even this increase does not reflect the fair market value. The respondents main ground for saying so is based on the sale of two pieces of land, one of which is the respondents' land adjacent to a commercial plot and the purchaser was a subsidiary of the respondent company and the learned Judge found that the transaction was not done at arm's length. The other was a small piece of land in Kepala Batas Town itself which was purchased by the respondents. The learned Judge held that both these sales were not comparable to the land acquired. We agree : *Ng Tiou Hong v. CLR Gombak* [1984] 1 CLJ (Rep) 289.

The learned Judge also found that there were no comparable sales for purpose of valuing the acquired land. We agree. The Government Valuer relied on evidence of awards made and accepted, sufficiently proximate in point of time to the relevant date for purposes of the present valuation. Such a method of valuation is acceptable : *Bertam Consolidated Rubber Co. Ltd. v. CLR Butterworth* [1984] 1 CLJ (Rep) 78. As part of this particular road project, the Government at the same time acquired part of Malakoff Estate adjoining Bertam Estate and awarded compensation at RM8,000 p.a. which was accepted. At the same time the Government acquired part of Choong Lye Hock Estate adjacent to Malakoff Estate, also for same project and awarded compensation at RM6,500 p.a. which was also accepted. Part of Bertam Estate itself, being adjacent to Kepala Batas Town and zoned for development, was previously acquired by the Government for low-cost housing and community centre and the valuation was RM12,000 p.a. and RM20,000 p.a. respectively. All three estates are subject to

s. 214A of the National Land Code (provision against fragmentation). The Government Valuer conceded that awards made by the collector and accepted by the land owners are not necessarily conclusive evidence of market value but they do act as acceptable comparables in the absence of comparable sales. Notwithstanding the encumbrance of s. 214A, he was of the opinion that Bertam Estate did possess some development potential by virtue of its proximity to Kepala Batas Town. However, being a very large estate and about four miles wide, not every portion will possess greater development potential particularly parts lying in the interior. Hence he divided the land acquired into belts and apportioned different values to each. In doing so, he used the base figure of RM8,000 p.a. for Zone C; added 10% to that value for Zone B at RM9,000 p.a; and added 80% for the purpose of assessing the value of Zone A at RM15,000 p.a. At the trial, the Government Valuer conceded that the Court in *Bertam Consolidated Rubber Co. Ltd. v. CLR Butterworth* (*ibid*) - had increased the Collector's award by 20% in respect of the earlier acquisition of part of the same estate as the present and that he had not taken this factor into consideration in the present valuation. It was on this concession that the learned Judge increased the present collector's award by 20%.

The respondents say even this increase is insufficient. They have not, however, shown to this Court that the enhanced compensation does not represent a fair market value of the land acquired. On the contrary, in respect of Zone C, their claim was only for RM7,500 p.a. but the Collector had awarded RM8,000 p.a. which the learned Judge has increased by another 20%. Against this the respondents' valuer states that the average value of rubber land at the material time was RM5,500 p.a (the Government Valuer says it was RM5,000 p.a.) and all the land acquired in this instance is rubber land. The respondents' valuer also relied on awards made in respect of other acquisitions ranging from RM5,000 p.a. for large acquisition to RM27,000 p.a. for an acquisition of Land with an area of Oa Or 4p. He also agreed, that lands nearer to Kepala Batas Town and lands with road frontage have greater potential value. The Government Valuer has taken all these factors into account, hence his base figure of RM5,000 p.a. was increased to RM8,000 p.a. The respondents' valuer, however, assessed the value for the rubber estate at RM15,000 p.a and proceeded to apportion that sum according to the belts. It must be observed, however, that the major portion of the acquired land was assessed at RM7,500 p.a. which is approximately that of the Government valuation. No real explanation however, has been given why rubber land should increase in value from RM5,500 p.a. to RM30,000 p.a. We are accordingly of the view, as the learned Judge was, that the Government Valuer's method of assessing fair market value using the average value as the base figure and then increasing it for development potential is the correct and equitable method of valuation.

Section 214A National Land Code

The question on the applicability of s. 214A of the National Land Code was raised but this issue has already been settled by the Federal Court in *Bertam Consolidated Rubber Co. Ltd. v. CLR Butterworth* (*ibid*). We would accordingly dismiss this part of the appeal.

Interest

Section 48 provides that in the event the Court awards compensation in excess of the award by the collector, the Court may direct the Collector to pay interest on such excess at the rate of 8% per annum from the date on which the Collector took possession of the land to the date of payment of such excess. The rate of interest at 8% per annum was increased from 6% per annum by the Land Acquisition (Amendment) Act 1984 which came into force on 20 January 1984. In the present case the Collector took possession on 21 February 1980.

The appellant says as the Collector took possession of the land before the amendment the rate should be 6% per annum. The learned Judge thought otherwise and awarded 8% per annum relying on *Municipal Council of Sydney v. Troy* [1928] AIR PC 128. In that case when the appellants acquired the land in June 1924 the rate of interest was 4%. On 17 September 1924 a new rate of interest at 6% was prescribed. On the question of the applicability of the new rate it was held that the rate of 6% as from that date applied to land acquired either before 17 September or after that date and that no question of retrospective operation arose. In our opinion, what that decision meant was that the respondent had a title to the higher rate of interest as from the date of the new rate coming into force even though the land was acquired prior to the new rate but the new rate does not apply to the period before the new rate came into force. This is clear from the concluding passage of the Privy Council which said:

> Accordingly, between 6 June and 17 September the rate will remain 4 per cent, and after that it is 6 per cent.

We would accordingly allow the appeal as regards interest and order the new rate to be effective from 20 January 1984.

Surveyor's Fees

The learned Judge ordered reimbursement of surveyor's and engineer's fees incurred by the respondents in the objection proceedings to the award of the Collector under s. 14(5) and on the authority of *Consolidated Plantation Bhd. v. Pemungut Hasil Tanah Klang* [1984] 1 CLJ (Rep) 93. It is true that an award of surveyor's fee at 1% (amounting to RM104,740) was made in that case but as there was no appeal on that part of the award the Federal Court did not deal with it. The claim for surveyor's fees, however, was dealt with by the Supreme Court in *Harrison's & Crossfields (M) Sdn. Bhd. v. Pemungut Hasil Tanah, Wilayah Persekutuan* [1988] 2 MLJ 299 where such a claim was dismissed on the ground that there is:

> nothing in the provisions of the Land Acquisition Act 1960 and the Schedule thereto to justify the making of an award to include the surveyor's fee. *Consolidated Plantation Bhd. v. Pemungut Hasil Tanah Kelang* is not an authority for allowing the surveyor's fee as the Federal Court judgment clearly states that it was confined only to the question of adequacy of the award of RM231,000 as the cost of turfing as compensation for the loss of water supply to the mill.

at p. 300. We would accordingly allow this part of the appeal.

Costs

On costs, the learned Judge said:

> As to the claim for costs, the Act by s. 51(1)(b) provides:
>
> > where the amount of the Court award exceeds the sum awarded by the Collector, the costs shall ordinarily be paid, by the Collector, but if the Court is of opinion that the claim of the applicant was so excessive or that he was so negligent in putting his case before the Collector that some deduction from his costs should be made, or that he should pay a part of the Collector's costs, the Court may at its discretion make such order as to costs as it may think fit;
>
> In the exercise of my discretion I therefore award the objectors the cost of these proceedings.

The appellants say the learned Judge should not have awarded costs to the respondents because s. 51(1)(c) applies to this case. That subsection reads:

> where the claim of the applicant made pursuant to any notice under s. 10 or s. 11 exceeds by

twenty per cent or more the amount of the Court award, he shall not be entitled to his costs.

Here, the difference between the respondent's claim and the amount of the Court award was 56.3% which exceeds the limit of 20% prescribed by s. 51(1)(c). We are of the view that on the facts before the Court, s. 51(1)(c) applies. The words "he shall not be entitled to his costs" are clear and unambiguous, and question of exercise of discretion did not arise. We would accordingly allow this part of the appeal.

The Declaration

The Court took 3 days to hear expert evidence on the drainage system. The gist of this evidence was that before the acquisition, the estate maintained the drains on both sides of the estate road which were called branch drains which flowed into main drains maintained by the Drainage and Irrigation Department before flowing into the sea. The object of the system is to prevent flooding in the estate. The dispute before the Court turned on whether the drains constructed by the Government on both sides of the road are deep enough for flood control. It is said that as damage is likely to be sustained which is not possible to quantify, the learned Judge had no alternative but to make the declaration in response to the respondents' claim for:

> A clear and enforceable undertaking in writing by the Drainage and Irrigation Department or the State Government of Penang that it will be responsible for the maintenance of the branch drains concerned so as to ensure a smooth flow to the main drains thus preventing any flooding and damage to the crops on the remaining unacquired lands of Bertam Estate.

Paragraph 2 of the First Schedule to the Act provides:

> 2. In determining the amount of compensation to be awarded for any schedule land acquired under this Act there shall be taken into consideration the following matters and no others:
>
> (d) the damage, if any, sustained or likely to be sustained by the person interested at the time of the Collector's taking possession of the land by reason of the acquisition injuriously affecting his other property, whether movable or immovable, in any other manner, or his actual earnings;
>
> (f) where only part of the land is to be acquired, any undertaking by the State Authority, or by the Government, person or corporation on whose behalf the land is to be acquired, for the construction or erection of roads, drains, walls, fences or other facilities benefiting any part of the land left unacquired, provided that the undertaking is clear and enforceable.

On the evidence, it is clear that if any damage is likely to be sustained it is going to be flooding of the unacquired lands retained by the respondents which is caused by an inadequacy of the drainage systems now in place or if adequate, due to poor (or lack of) maintenance of the drainage system by the Government. Such an eventuality is covered by para. (2)(d) of the first schedule. If there is such an eventuality, then the damages must be assessed and quantified here and now. There cannot be an undertaking by the Government as set out in the declaration in substitution for compensation under the aforesaid subparagraph (2)(d). The only form of undertaking that the Government could give is under para. 2(f) but there was none in this case. In any event, what the declaration seeks to do is the maintenance of drains which is already the responsibility of the Government, viz., the branch drains on both sides of the public road and the main drains maintained by the Drainage and Irrigation Department. In addition, Bertam Estate is within the Bertam Drainage Board Area which is a system of drainage to alleviate flooding in the area as the land is flat and also serves as a catchment area. The Drainage and Irrigation Department is responsible to the board on which sit the respondents. This responsibility also includes the maintenance

of main drains in Bertam Estate. We are of the view that there is already sufficient infra-structure and co-ordination to meet the objects of the declaration herein and as such the declaration is superflous at best. We would accordingly allow this part of the appeal; set aside the declaration and we allow the appeal against the award of RM27,200 for drains. For the reasons stated, we allow the appeal and set aside the order of the High Court in respect of:

(a) The payment of 27,200 for drains;

(b) The reimbursement of surveyor's and engineer's fees;

(c) Costs; and

(d) The declaration.

The rate of interest on the excess is varied to 6% per annum from 21 February 1980 to 19 January 1984 per annum from 20 January 1984 to date of payment.

The cross-appeals in respect of:

(i) Compensation for the land; and

(ii) Compensation for loss of crops are hereby dismissed.

The respondents shall pay the costs of this appeal. Deposit to be refunded to the appellant.

Also found at [1990] 1 CLJ 707